

No. 16354 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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JOHN D. BUDKE,

Appellant,

VS.

KAISER-FRAZER COMPANY OF ANCHOR-  
AGE,

Appellee.

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Transcript of Record

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Appeal from the District Court  
for the District of Alaska,  
Third Division

FILED

JUL 23 1959

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

BELL, SANDERS & TALLMAN, by  
JAMES K. TALLMAN,

Box 1599,

Anchorage, Alaska,

For Appellant.

DAVIS, HUGHES & THORSNESS, by  
JOHN P. HUGHES,

Box 477,

Anchorage, Alaska,

For Appellee.





In the District Court for the District of Alaska,  
Third Division

No. A-10327

JOHN D. BUDKE,

Petitioner,

vs.

KAISER-FRAZER COMPANY OF ANCHOR-  
AGE,

Defendant.

JUDGMENT ON DECISION AND AWARD OF  
ALASKA INDUSTRIAL BOARD

This matter came on regularly to be heard on 11th of October, 1954, on the petition for a judgment on a decision and award of the Alaska Industrial Board. It appearing to the Court: That on September 7, 1954, in the case of "John D. Budke, Applicant, vs. Kaiser-Frazer Co. of Anchorage, Defendant," the Alaska Industrial Board made its Decision and Award, awarding petitioner certain compensation; that a certified copy of such Decision and Award is on file herein; that no part of said compensation awarded has been paid; and that no appeal has been taken from said Decision and Award by defendant within the time allowed by law; and the court being fully advised in the premises; it is hereby Ordered, Adjudged and Decreed:

1. That petitioner have judgment against defendant as follows:

a. As compensation for temporary total disability, the sum of \$78.00 per week from October 11, 1953, until such time as petitioner has been as far restored physically as the permanent character of his injuries will permit, but not to exceed a total of 24 months from and after October 11, 1953.

b. For permanent partial disability, the sum of \$7,200.00.

c. For all expenses incurred by petitioner for all such medical, surgical, hospital and other treatment and care as is provided for by Section 43-3-2 ACLA 1949, in respect to his injuries in this matter.

d. For petitioner's costs and disbursements incurred herein.

e. For a reasonable attorney's fee for petitioner.

f. For interest and penalty as provided in Section 43-3-3 ACLA 1949.

2. That notification of the entry of this judgment be given by the clerk of this court to the parties to the above-entitled cause.

Done in Open Court at Anchorage, Alaska, this 11th day of October, 1954.

/s/ JAMES L. McCARREY, JR.,  
District Judge.

[Endorsed]: Filed and entered October 11, 1954.

[Title of District Court and Cause.]

## EXECUTION

The President of the United States of America  
To the Marshal of Said Division and Territory,  
Greeting:

Whereas, John D. Budke recovered judgment against Kaiser-Frazer Company of Anchorage in the United States District Court for said Division and Territory, holding terms as aforesaid on the 11th day of October, 1954, for the sum of \$7,200.00 Dollars with interest thereon at the rate of 6% per annum until paid, and costs of suit, amounting to  
.....

Therefore, in the name of the United States of America, you are hereby commanded to levy upon and seize and take into execution the personal property of the said Kaiser-Frazer Company of Anchorage in your Division of said District sufficient, subject to execution, to satisfy said judgment, interest and increased interest, costs and increased costs, and make sale thereof according to law; and if sufficient personal property cannot be found, then you are further commanded to make the amount of said judgment, interest, and increased cost out of proceeds of the sale of Lot Four (4) in Block Nineteen (19) of the East Addition to the Original Townsite of Anchorage.

Herein Fail Not, and have you then and there this writ.

Judgment .....	\$7,200.00
Int. to 11/20/57.....	1,333.10
Cost of Execution.....	3.20

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Total .....\$8,536.30

Witness the Honorable J. L. McCarrey, Jr.,  
Judge of said Court, and the seal of said Court  
hereto affixed this November 21, 1957.

[Seal] WM. A. HILTON,  
Clerk;

By /s/ CLARA RHODES,  
Deputy.

Received December 9, 1957.

[Endorsed]: Filed December 11, 1957.

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[Title of District Court and Cause.]

MOTION FOR ORDER TO SHOW CAUSE  
AND TEMPORARY INJUNCTION

Plaintiff, above named, John D. Budke, by and  
through his attorneys of record, moves the court  
as follows:

I.

For the issuance of an order to show cause to the  
United States Marshal for the Third Judicial Di-  
vision, District of Alaska, to appear, and show  
cause, if any, why he should not be ordered to com-  
plete his duties in connection with the execution

issued in the above-entitled action on the 21st day of November, 1957, and sell the real property described in said execution and to continue publication of the Notice of Marshal's Sale.

II.

For an order enjoining the said United States Marshal from releasing the levy of execution heretofore effected upon the said real property, pending the hearing upon the order to show cause.

BELL, SANDERS &  
TALLMAN,

By /s/ JAMES K. TALLMAN,  
Attorneys for Plaintiff.

[Endorsed]: Filed February 11, 1958.

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[Title of District Court and Cause.]

AFFIDAVIT

United States of America,  
Territory of Alaska—ss.

James K. Tallman, being first duly sworn, upon his oath, deposes and states:

That he is the attorney of record in the above-captioned case for the above-named plaintiff, and makes this affidavit of his own knowledge and information.

That affiant was served with a letter from the Office of the United States Marshal, signed by

Chief Deputy David A. Drew, and given to affiant by the said David A. Drew on the 5th day of February, 1958. That a copy of said letter is attached hereto, marked Exhibit "A."

That in addition to receiving the aforesaid letter, affiant also received a copy of an alleged Third-Party Claim at the same time that the letter was served upon affiant. That a copy of said Third-Party Claim is attached hereto and marked Exhibit "B."

That in addition to receiving the letter and Third-Party Claim as aforementioned, affiant was informed by the Deputy United States Marshal that the levy of execution herein would be released unless the bond as demanded in said letter were furnished.

Further affiant saith not.

/s/ JAMES K. TALLMAN.

Subscribed and Sworn to Before Me this 10th day of February, 1958.

[Seal]      /s/ VIRINDA RANDALL,  
Notary Public in and for  
Alaska.

My commission expires: 10-10-61.

EXHIBIT A

Department of Justice  
Office of United States Marshal  
Third Division, District of Alaska  
Anchorage, Alaska

February 5, 1958.

To: Bell, Sanders & Tallman.

This is to advise you that on the 4th day of February, 1958, a Third-Party Claim was filed with the U. S. Marshal in the case of John D. Budke vs. Kaiser-Frazer Co. of Anchorage, District Court Cause No. A-10,327.

Pursuant to Section 55-9-84 of the Compiled Laws of Alaska, 1949, it now becomes the duty of this office to demand a bond in double the value set by the third-party claimant, Northwest Auto Sales, Inc.

This office considers that a reasonable time to furnish the said bond would terminate at 5:00 p.m. Monday, February 10, 1958.

A copy of the Third-Party Claim was delivered by hand to James K. Tallman at the U. S. Marshal's office on the 5th day of February, 1958.

FRED S. WILLIAMSON,  
U. S. Marshal;

By /s/ DAVID A. DREW,  
Deputy.



## EXHIBIT B

In the District Court for the District of Alaska,  
Third Judicial Division

No. A-10,327

JOHN D. BUDKE,

Plaintiff,

vs.

KAISER-FRAZER CO. OF ANCHORAGE,

Defendant.

## THIRD-PARTY CLAIM

To: Fred S. Williamson, United States Marshal,  
District of Alaska, Third Division, and to John  
D. Budke, the above-named plaintiff, and to  
Bell, Sanders & Tallman, attorneys for the  
plaintiff, John D. Budke, and to Whom It May  
Concern:

You and each of you will please take notice  
that Northwest Auto Sales, Inc., an Alaskan cor-  
poration, is the owner in fee simple of and claims  
certain real property situated in the City of  
Anchorage, Third Judicial Division, Territory of  
Alaska, and more particularly described as Lot 4,  
in Block 19, of the East Addition to the Original  
Townsite of Anchorage, Alaska, according to the  
official map or plat of such property on file and of  
record in the office of the United States Commis-



sioner and ex officio Recorder for Anchorage Precinct at Anchorage, Alaska, together with all the tenements, hereditaments and appurtenances thereunto belonging or in any way appertaining.

It appears that you have levied execution upon the above-described property in the above-entitled action under execution dated November 21, 1957, and that the property above described is presently being advertised for sale by you under such execution.

Please be advised that Kaiser-Frazer Co. of Anchorage, the defendant in the above-entitled action, has no interest whatsoever in or to the property above described and levied upon by you. That Northwest Auto Sales, Inc., an Alaskan corporation, is the owner of the above-described property and all of the same in fee simple title under Marshal's Deed dated July 15, 1957, recorded July 16, 1957, in book 246 at page 334 of the Records of Anchorage recording precinct, Third Judicial Division, Territory of Alaska, at Anchorage, Alaska, wherein Fred S. Williamson, United States Marshal for the District of Alaska, Third Division, as grantor, conveyed the above-described property to Northwest Auto Sales, Inc. That the value of the property above described is \$15,000.00. That Northwest Auto Sales, Inc., is entitled to the immediate and undisturbed possession of the above-described property as the owner thereof.

Dated at Anchorage, Alaska, this 4th day of February, 1958.

NORTHWEST AUTO SALES,  
INC.,

An Alaskan Corporation;

By /s/ EDWARD R. MEEKINS,  
Its President.

United States of America,  
Territory of Alaska—ss.

Edward R. Meekins, being first duly sworn, upon his oath deposes and says: That he is the president of Northwest Auto Sales, Inc., an Alaskan corporation. That Northwest Auto Sales, Inc., is the owner in fee simple of certain real properties situated in the City of Anchorage, Anchorage recording precinct, Third Judicial Division, Territory of Alaska, and more particularly described as follows: Lot 4, in Block 19 of the East Addition to the Original Townsite of Anchorage, Alaska, according to the official map or plat of such property on file and of record in the office of the United States Commissioner and ex officio Recorder for Anchorage Precinct at Anchorage, Alaska, together with all the tenements, hereditaments and appurtenances thereunto belonging or in any way appertaining.

That the United States Marshal for the District of Alaska, Third Division, claims to have levied

execution on the above-described property by execution issued out of the District Court for the District of Alaska, Third Division, in the above-entitled cause, such execution being dated the 21st day of November, 1957, and such execution having been supposedly levied upon the above-described property, on or about the 9th day of December, 1957, by service made upon Edward R. Meekins as the occupant of the property. That affiant further says that the above-described property is being advertised for sale by the United States Marshal for the District of Alaska, Third Division, under the execution above mentioned.

That the title of Northwest Auto Sales, Inc., to the property above described is a conveyance in the nature of a Marshal's Deed, executed July 15, 1957, by Fred S. Williamson, United States Marshal, as grantor, to and in favor of Northwest Auto Sales, Inc., as grantee, wherein the above-described property was conveyed in fee simple to the claimant Northwest Auto Sales, Inc. That such deed was recorded on the 16th day of July, 1957, in book 246 at page 334 of the records of Anchorage recording precinct at Anchorage, Alaska. That Kaiser-Frazer Co. of Anchorage, the above-named defendant, had no title or interest whatsoever in or to the property at the time of the supposed levy of execution in this matter and that such defendant had no interest whatsoever in or to the property and that the claimant Northwest Auto Sales,

Inc., is the sole owner of the property above described.

/s/ EDWARD R. MEEKINS,  
President of Northwest Auto  
Sales, Inc.

Subscribed and Sworn to before me this ....  
day of February, 1958.

/s/ EDWARD V. DAVIS,  
Notary Public in and for the  
Territory of Alaska.

My Commission expires: 11-7-1958.

[Endorsed]: Filed February 11, 1958.

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[Title of District Court and Cause.]

### NOTICE OF MARSHAL'S SALE

A public notice is hereby given that under and by virtue of a Writ of Execution issued on the 21st day of November, 1957, by the Honorable J. L. McCarrey, Jr., Judge of the District Court for the Third Division, Territory of Alaska, I will offer for sale at public auction to the highest bidder for cash on the 24th day of February, 1958, at the hour of 10:30 o'clock in the forenoon, at the West Front steps of the Federal Building, Anchorage, Alaska, the following-described real property, to wit:

Lot Four (4), in Block Nineteen (19) of the East Addition of the Original Townsite of Anchorage, according to the map and plat on

file in the office of the U. S. Commissioner and  
Ex-officio Recorder of Anchorage Precinct,  
Territory of Alaska,

or as much thereof as it may be sufficient to pay a  
judgment in the sum of Seven Thousand Two Hun-  
dred Dollars (\$7,200.00), together with interest at  
the rate of Six Per Cent (6%) per annum from  
the 11th day of October, 1954, together with costs  
and expenses of this sale.

January 24th, 1958.

FRED S. WILLIAMSON,  
U. S. Marshal;

By /s/ LEE A. WILLIAMS,  
Deputy.

Court No. A-10,327  
Marshal's No. 8853

United States Marshal,  
Third Judicial Division,  
Territory of Alaska.

I hereby certify and return that I received the  
within and hereto annexed Writ of Execution on  
the 9th day of December, 1957, at Anchorage, and  
that on the 9th day of December, 1957, I personally  
served the same in Anchorage, Third Judicial Divi-  
sion, Territory of Alaska, by then and there de-  
livering to and leaving a copy thereof to Edward R.  
Meekins, occupant of the following-described prop-

erty belonging to defendant Kaiser-Frazer Company of Anchorage:

Lot Four (4), in Block Nineteen (19) of the East Addition of the Original Townsite of Anchorage, according to the map and plat on file in the office of the U. S. Commissioner and Ex Officio Recorder of Anchorage Precinct, Territory of Alaska.

I further certify that I noticed the same for Sale, in the manner prescribed by the law in such cases, on the 24th day of January, 1958, whereas said Sale was to be held on the 24th day of February, 1958.

Further, I received a copy of a Third-Party Claim, in the above-numbered cause, from North West Auto Sales, Inc., on the 4th day of February, 1958.

Further, on the 5th day of February, 1958, I demanded from the Plaintiff a bond in double the value set by the Third-Party Claimant, and gave said Plaintiff reasonable time to produce said bond.

Further, Plaintiff failed to produce such a bond; therefore, I cancelled the said Sale, and released said Execution.

Dated: Feb. 27, 1958.

FRED S. WILLIAMSON,  
United States Marshal;

By /s/ LEE A. WILLIAMS,  
Deputy U. S. Marshal.



Posting Notice .....	\$ 3.00
Mileage .....	.20
Advertising .....	29.90
<hr/>	
Total .....	\$33.10

[Endorsed]: Filed March 4, 1958.

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[Title of District Court and Cause.]

### MOTION FOR ORDER TO SHOW CAUSE

Plaintiff, by and through his attorneys of record, Bell, Sanders & Tallman, moves this Honorable Court as follows:

For the issuance of an order directed to Northwest Auto Sales, Inc., an Alaskan corporation, to appear, by and through its duly elected officers, and show cause, if any said corporation has, why a special execution should not be issued in the above-entitled matter and the property consisting of Lot Four (4), in Block Nineteen (19), of the East Addition to the Original Townsite of Anchorage, Alaska, according to the official map or plat of such property on file and of record in the office of the United States Commissioner and Ex Officio Recorder for Anchorage Precinct, Anchorage, Alaska, together with all the tenements, hereditaments, and appurtenances thereunto belonging or in anyway appertaining, be levied upon and ordered sold by the United States Marshal for the Third Judicial Division, Territory of Alaska.

Dated at Anchorage, Alaska, this 7th day of November, 1958.

BELL, SANDERS &  
TALLMAN,

By /s/ JAMES K. TALLMAN,  
Attorneys for Plaintiff.

[Endorsed]: Filed November 7, 1958.

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[Title of District Court and Cause.]

### AFFIDAVIT

United States of America,  
Territory of Alaska—ss.

James K. Tallman, being first duly sworn, upon his oath, deposes and states:

That he is the attorney of record in the above-captioned case for the above-named plaintiff, and makes this affidavit of his own knowledge and information.

That affiant caused to be issued an execution in the above-captioned matter and directed the Marshal to levy upon the following-described property:

Lot Four (4), in Block Nineteen (19) of the East Addition of the Original Townsite of Anchorage, according to the map and plat on file in the office of the U. S. Commissioner and Ex Officio Recorder of Anchorage Precinct, Territory of Alaska.

Affiant further states that he prepared a Notice



of Marshal's Sale for the U. S. Marshal's office which was signed by Lee A. Williams and publication was made in the Anchorage Daily Times giving notice of the sale of the above-described property.

Affiant further states that on or about the 4th day of February, 1958, Northwest Auto Sales, Inc., an Alaskan corporation, served a purported Third-Party Claim upon the U. S. Marshal for the Third Judicial Division, Territory of Alaska, and the Marshal then refused to sell the property as indicated by the Notice of Marshal's Sale unless the plaintiff were to put up a bond in double the value set by the third-party claimant, which would have required a bond in the amount of \$30,000.00.

Because the plaintiff was unable to raise a bond in the amount of \$30,000.00, the U. S. Marshal released the levy upon said property and refused to continue with the sale of the property, although affiant prepared an Order to Show Cause and took steps to attempt to get the Court to direct the Marshal to continue with the sale. In connection with such attempt affiant also prepared a Memorandum Brief and an Affidavit which were prepared on February 10, 1958, and filed on February 11, 1958.

Affiant further states that the property levied upon is the same property that is the subject of the action in Case No. A-9729, also decided by the above-entitled court, which case essentially held that the plaintiff's judgment lien was not affected by

the Marshal's sale under which Northwest Auto Sales, Inc., acquired the title that it allegedly has at the present time and that the position of the parties is set forth in the Memorandum Brief heretofore filed.

Affiant further states that in affiant's opinion it will be necessary to bring an action to litigate the priority of the claims at some future time as between John D. Budke and Northwest Auto Sales, Inc., but that Budke, under and by virtue of his judgment, should be entitled to sell the interest, if any, in the property and then the priority as between the Northwest Auto Sales, Inc., and the purchaser at this next Marshal's sale could be determined. However, affiant further states that it is his opinion that an action now would be premature if brought before the plaintiff, John D. Budke, had perfected what rights he has, to as great an extent as they can be perfected, under the judgment in this case, and that the method of doing so is by executing upon the property herein, and having said property sold.

Further affiant saith not.

/s/ JAMES K. TALLMAN.

[Endorsed]: Filed November 7, 1958.

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[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

This matter coming on to be heard on the plaintiff's Motion for Order to Show Cause, and the

Court having read the Affidavit on file herein, and having read the Memorandum Brief in support thereof, and being fully advised in the premises,

It Is, Therefore, Ordered that Northwest Auto Sales, Inc., an Alaskan corporation, appear, by and through its duly elected officers, before the undersigned District Judge in the Courtroom at Anchorage, Alaska, on the 17th day of November, 1958, at the hour of 1:30 o'clock p.m. of said day, and show cause, if said corporation has any, why a special execution should not be issued in the above-entitled matter and the property consisting of Lot Four (4), in Block Nineteen (19), of the East Addition to the Original Townsite of Anchorage, Alaska, according to the official map or plat of such property on file and of record in the office of the United States Commissioner and Ex Officio Recorder for Anchorage Precinct, Anchorage, Alaska, together with all the tenements, hereditaments, and appurtenances thereunto belonging or in anyway appertaining, be levied upon and ordered sold by the United States Marshal.

Dated at Anchorage, Alaska, this 7th day of November, 1958.

/s/ JAMES L. McCARREY, JR.,  
District Judge.

[Endorsed]: Filed and entered November 7, 1958.

[Title of District Court and Cause.]

## RETURN ON ORDER TO SHOW CAUSE

Comes Now Northwest Auto Sales, Inc., an Alaska corporation, by and through Edward R. Meekins, its president, and in answer to the order to show cause entered by the above-entitled court in the above-entitled action on the 7th day of November, 1958, makes this return to such order to show cause and shows to the court as follows:

### I.

Northwest Auto Sales, Inc., by reference makes all of the records and files of Cause No. A-9729, District Court for the District of Alaska, Third Judicial Division, entitled First National Bank of Anchorage, a corporation, plaintiff, vs. Kaiser-Fraser of Anchorage, Inc., et al., and Cause No. A-10,327, District Court for the District of Alaska, Third Judicial Division, entitled John D. Budke, petitioner, vs. Kaiser-Fraser Company of Anchorage, defendant, the above-entitled cause, a part of this return and requests the court to take judicial notice of the matters contained in such records and files.

### II.

That as will appear from the records and files of the causes of action above mentioned, the plaintiff, John D. Budke, never at any time had nor does he now have any lien against the property known as Lot 4 in Block 19 of the East Addition to the Original Townsite of Anchorage, Alaska, by reason

of the fact that the defendant above named, Kaiser-Frazer Company of Anchorage, never at any time owned the property above described and such property never at any time stood in the name of that company.

### III.

That Northwest Auto Sales, Inc., an Alaska corporation, is not a party to the above-entitled action and accordingly is not a proper party to be summoned into such action by an order to show cause, if in fact an order to show cause is appropriate in this type of matter.

### IV.

That Northwest Auto Sales, Inc., an Alaska corporation, has not owned any interest in the property known as Lot 4 of Block 19 of the East Addition to the Original Townsite of Anchorage, more particularly described in Mr. Tallman's affidavit and in the order to show cause, since the 23rd day of February of 1958, when Northwest Auto Sales, Inc., an Alaska corporation, sold such property to Karl V. Holmberg and Julian Longoria. That the deed from Northwest Auto Sales, Inc., to Karl V. Holmberg and Julian Longoria was dated February 25, 1958, and was recorded on May 5, 1958, at Book 160 at page 1 of the records of Anchorage Recording Precinct at Anchorage, Alaska.

### V.

That as will appear from the affidavit of Edward R. Meekins, which is presented herewith and which

by reference is made a part hereof to the same extent as though set out in full herein, the title to Lot 4 of Block 19 of the East Addition to the Original Townsite of Anchorage, Alaska, insofar as it is here material is as follows:

(a) Kaiser-Fraser of Anchorage, Inc., an Alaska corporation, acquired the property known as Lot 4 of Block 19 of the East Addition to the Original Townsite of Anchorage, Alaska, from one Nels O. Nelson, by Warranty Deed dated January 8, 1952, recorded August 7, 1952, in Book 137 at page 46 of the records of Anchorage Recording Precinct at Anchorage, Alaska.

(b) Lot 4 of Block 19 of the East Addition to the Original Townsite of Anchorage, Alaska, as above described, was mortgaged on April 20, 1953, by its owner, Kaiser-Fraser of Anchorage, Inc., to the First National Bank of Anchorage, a national banking association, for the sum of Ten Thousand (\$10,000.00) Dollars and that such mortgage was recorded on April 23, 1953, in Book 155 at page 290 of the records of Anchorage Recording Precinct, at Anchorage, Alaska.

(c) That the mortgage was not paid and that the mortgagee, First National Bank of Anchorage, in cause No. A-9729 of this court, foreclosed such mortgage by decree of this court entered October 12, 1955. That under and by virtue of such decree of foreclosure the property known as Lot 4 of Block 19 of the East Addition to the Original Town-



site of Anchorage, Alaska, as above described, was sold on December 5, 1955, to the undersigned Northwest Auto Sales, Inc., at a price of Thirteen Thousand and Four (\$13,004.00) Dollars. The sale was confirmed by this court on July 6, 1956. The property was not redeemed from the sale by anybody and the United States Marshal for the District of Alaska, Third Judicial Division, executed a deed conveying the property above described to Northwest Auto Sales, Inc., and that such deed was recorded on July 16, 1957, at Book 246, page 334 of the records of Anchorage Recording Precinct at Anchorage, Alaska.

#### VI.

That as will appear from the affidavit of Mr. Tallman in support of the motion for order to show cause the undersigned Northwest Auto Sales, Inc., on or about the 4th day of February, 1958, filed with the United States Marshal for the Third Judicial Division, District of Alaska, a certain third-party claim with reference to the property known as Lot 4 in Block 19 of the East Addition, as above described, and with reference to a purported execution issued out of this court in the above-entitled cause and dated November 21, 1957. And the United States Marshal, as provided by law, demanded a bond of the plaintiff Budke, in order to hold such property as against the third-party claim. The bond was not furnished and the property was released.

#### VII.

That as Northwest Auto Sales, Inc., is informed,

and so alleges the fact to be, petitioner Budke has no right under any circumstances to issue an execution against Northwest Auto Sales, Inc., and has no right at all to issue any execution against the property known as Lot 4 of Block 19 of the East Addition, as above described, and that if an execution were issued and attempted to be levied against the property that any such levy would cloud the title to the property to the damage of the owners of the property and without any right whatsoever therein on the part of the petitioner. Furthermore Northwest Auto Sales, Inc., alleges that under the law that if an execution were to be levied against the property above described that the owners of the property would be entitled to file a third-party claim as a third-party claim was filed by Northwest Auto Sales, Inc., and in that event the law is mandatory and the Marshal could not retain the property as against such third-party claim unless a bond were put up by the plaintiff to hold the execution levied. Mr. Tallman in his affidavit has stated that the petitioner is unable or unwilling to put up a bond. Accordingly any execution that might be issued by this court would be the performance of a vain and useless act.

### VIII.

That petitioner in this action is attempting to do by indirection what he cannot do and which he knows he cannot do by direction. As a matter of fact, and as will appear from all the records and files of this action, and of cause No. A-9729, if



petitioner thinks he has any right whatsoever in or to the property described as Lot 4 in Block 19 of the East Addition, as above described such right will have to be determined by an action in this court and not by an ex parte proceeding for levying execution against property upon which the petitioner never had and does not now have any lien and property which never belonged and does not now belong to the judgment defendant above named.

### IX.

This return is based on all the records and files of the above-entitled cause and of cause No. A-9729, both in the District Court for the District of Alaska, Third Judicial Division, and is based on the affidavit of Edward R. Meekins presented herewith.

Wherefore, having fully made return to the order to show cause entered in the above-entitled matter by this court on the 7th day of November, 1958, Northwest Auto Sales, Inc., an Alaska corporation, prays that special execution should not be issued in the above-entitled matter and that no attempt be made to levy any execution on Lot 4 of Block 19 of the East Addition to the Original Townsite of Anchorage, Alaska, or other proceedings taken with reference to such property and prays for the costs, including a reasonable attorney's fee in favor of Northwest Auto Sales, Inc., with reference to these proceedings.

Dated at Anchorage, Alaska, this 15th day of November, 1958.

NORTHWEST AUTO SALES,  
INC.,

An Alaska Corporation;

By /s/ EDWARD R. MEEKINS,  
President.

Service of copy acknowledged.

[Endorsed]: Filed November 15, 1958.

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[Title of District Court and Cause.]

AFFIDAVIT

United States of America,  
Territory of Alaska—ss.

Edward R. Meekins, being first duly sworn, upon his oath deposes and says:

That he has caused a record search to be made concerning the property known as Lot 4 in Block 19 of the East Addition to the Original Townsite of Anchorage, Alaska, and herein concerned, and states the fact in such matter to be as follows as disclosed by the records of Anchorage Recording Precinct at Anchorage, Alaska:

1. Title to the property above described on the 8th day of January, 1952, stood in one Nels O. Nelson. That Nels O. Nelson, by Warranty Deed, dated January 8, 1952, recorded August 7, 1952, in

Book 137 at page 46 of the records of Anchorage Recording Precinct at Anchorage, Alaska, conveyed the property above described to a corporation known as Kaiser-Fraser of Anchorage, Inc.

2. That on April 20, 1953, Kaiser-Fraser of Anchorage, Inc., mortgaged the property above described and herein concerned to the First National Bank of Anchorage, Alaska, for the sum of Ten Thousand (\$10,000.00) Dollars. That such mortgage was recorded on April 23, 1953, in Book 155 at page 290 of the records of Anchorage Recording Precinct at Anchorage, Alaska.

3. That the District Court for the District of Alaska, Third Judicial Division, in cause No. A-9729 of such court, foreclosed the mortgage described in the preceding paragraph by decree dated October 12, 1955, and that such decree directed the United States Marshal for the District of Alaska, Third Judicial Division, to sell the property described as Lot 4 in Block 19 of the East Addition, as above described. That under such decree the property was sold on December 5, 1955, to Northwest Auto Sales, Inc., an Alaska corporation, and that such sale was confirmed by the above-entitled court on July 6, 1956. No redemption was made from the sale, either by the petitioner in the above-entitled cause, or otherwise, and the United States Marshal by Marshal's Deed conveyed the property known as Lot 4 of Block 19 of the East Addition, as above described, to Northwest Auto Sales, Inc. That such Marshal's Deed was recorded July 16,

1957, in Book 246 at page 334 of the records of Anchorage Recording Precinct at Anchorage, Alaska.

4. That Northwest Auto Sales, Inc., was the record owner of the property above described until February 25, 1958, at which time it sold the property to Karl V. Holmberg and Julian Longoria and conveyed the property to such parties by deed dated that date and recorded May 5, 1958, in Book 160 at page 1 of the records of Anchorage Recording Precinct at Anchorage, Alaska.

5. That the records of Anchorage Recording Precinct do not disclose that Kaiser-Fraser Company of Anchorage, the above-named defendant, ever had any interest whatsoever in the property known as Lot 4 of Block 19 of the East Addition to the Original Townsite of Anchorage, Alaska.

/s/ EDWARD R. MEEKINS.

Subscribed and Sworn to before me this 15th day of November, 1958.

[Seal]      /s/ EDWARD V. DAVIS,

Notary Public in and for the  
Territory of Alaska.

My Commission expires: 11-7-1962.

Receipt of copy acknowledged.

[Endorsed]: Filed November 15, 1958.

[Title of District Court and Cause.]

M.O. RENDERING ORAL DECISION (TD)

Before the Honorable J. L. McCarrey, Jr., District Judge.

This matter comes before the Court on an order to show cause why execution on the plaintiff's judgment should not be allowed, argument having heretofore been heard on November 17, 1958, and decision reserved.

The Court hereby renders its oral decision: For the reason that the defendant, Kaiser-Frazer, showed to the Court that Workman's Compensation lien judgment of the plaintiff was never perfected, and for the further reason that the plaintiff showed there was two unsatisfied tax liens, one to the federal government and one to the Territory of Alaska, which are prior to the lien of the plaintiff, the Court now finds that the judgment of the plaintiff is not entitled to execution and further finds that the determination of the marshal requiring that plaintiff post bond in twice the amount is proper.

The Court hereby holds that the Order to Show Cause should now be dismissed.

Entered November 18, 1958.

In the District Court for the District of Alaska,  
Third Judicial Division

No. A-10,327

(See Also A-9729, First National Bank of Anchorage v. Kaiser-Fraser of Anchorage, Inc.)

JOHN D. BUDKE,

Petitioner,

vs.

KAISER-FRASER COMPANY OF ANCHORAGE,

Defendant.

### ORDER

The above-entitled matter came on for hearing before this court, before the Honorable J. L. McCarrey, Jr., District Judge, sitting without the aid of a jury, on the 17th day of November, 1958, on an order to show cause entered at the request of the petitioner John D. Budke in cause of action No. A-10,327, above described. In answer to the order to show cause Northwest Auto Sales, Inc., an Alaska corporation, filed its return on order to show cause, together with the affidavit of Edward R. Meekins, as to the title to the property concerned in the action designated as No. A-9729.

The matter was argued to the court by counsel for the respective parties and the court took the matter under advisement and being fully and duly advised in the premises and having heretofore and



on the 18th day of November, 1958, returned oral decision in the matter.

Now, Therefore, in accordance with the oral decision it is hereby Ordered that the order to show cause entered heretofore by this court in cause number A-10,327 is hereby dismissed.

Done at Anchorage, Third Judicial Division, Territory of Alaska, this 10th day of December, 1958.

/s/ J. L. McCARREY, JR.,  
District Judge.

We object to this order.

/s/ BAILEY & BELL.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered December 10, 1958.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that John D. Budke, Petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Minute Order of the above-entitled Court as follows:

## M. O. Rendering Oral Decision (TD)

“No. A-10,327, John D. Budke, vs. Kaiser-Frazer  
Company of Anchorage.

Before the Honorable J. L. McCarrey, Jr., Dis-  
trict Judge.

This matter comes before the Court on an order to show cause why execution on the plaintiff's judgment should not be allowed, argument having heretofore been heard on November 17, 1958, and decision reserved,

The Court Hereby renders its oral decision:

For the reason that the defendant, Kaiser-Frazer, showed to the Court that Workman's Compensation lien judgment of the plaintiff was never perfected, and for the further reason that the plaintiff showed there was two unsatisfied tax liens, one to the federal government and one to the Territory of Alaska, which are prior to the lien of the plaintiff, the Court now finds that the judgment of the plaintiff is not entitled to execution and further finds that the determination of the Marshal requiring that plaintiff post bond in twice the amount is proper, the Court hereby holds that the Order to Show Cause should be dismissed.”

Above Minute Order entered Journal No. J62, page No. 143, November 18, 1958;

And, further, petitioner appeals from that Order in this same action ordering that the order to show



cause be dismissed, made and entered Journal 62, Page 277, on December 10, 1958.

Dated this 18th day of December, 1958, at Anchorage, Alaska.

BELL, SANDERS &  
TALLMAN,

Attorneys for Appellant;

By /s/ JAMES K. TALLMAN.

[Endorsed]: Filed December 18, 1958.

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE  
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75(g) and 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding. No designation of record having been filed.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit, San Francisco 1, California, from Minute Order entered Journal

No. J62, Page No. 143, November 18, 1958, and Order entered Journal 62, Page No. 277, December 10, 1958.

Dated at Anchorage, Alaska, this 23rd day of January, 1959.

[Seal]      /s/ WM. A. HILTON,  
Clerk.

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[Endorsed]: No. 16354. United States Court of Appeals for the Ninth Circuit. John D. Budke, Appellant, vs. Kaiser-Frazer Company of Anchorage, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: January 26, 1959.

Docketed: February 9, 1959.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.